Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Core Communications, Inc.,	)	
	)	
Complainant,	)	
	)	
v.	)	File No. EB-01-MD-007
	)	
Verizon Maryland Inc.,	)	
	)	
Defendant.	)	
	)	

ORDER

Adopted: February 2, 2004 **Released: February 3, 2004**

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Order, we deny the request of defendant Verizon Maryland Inc. ("Verizon") that we include in the record of the damages phase of this proceeding newly-discovered documents that Verizon should have produced during the liability phase of this proceeding, but did not.[1] For the following reasons, we conclude that Verizon's request lacks merit.

II. BACKGROUND

2. On March 21, 2001, Complainant Core Communications, Inc. ("Core") filed a formal complaint against Verizon pursuant to section 208 of the Communications Act of 1934, as amended ("Act").[2] In its Complaint, Core alleged that Verizon had violated, *inter alia*,

[1] For purposes of this Order, we use the term "produce" broadly to include identification of documents pursuant to section 1.724(f) of the Commission's rules, 47 C.F.R. § 1.724(f), as well as physical conveyance of the documents themselves.

[2] 47 U.S.C. § 208. *See Core Communications, Inc. v. Verizon Maryland Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 7962 (2003) ("*Liability Order*"), *petition for recon. pending*.

section 251(c)(2) of the Act[3] and Verizon's interconnection agreement with Core by unreasonably delaying interconnection with Core and by failing to inform Core in a timely manner of the delay.[4] Pursuant to Core's unopposed request under section 1.722(d) of the Commission's rules,[5] Commission staff bifurcated the complaint proceeding, and addressed liability issues prior to consideration of damages issues.[6] Discovery in the liability phase of the proceeding was conducted over a period of more than six months, with both Core and Commission staff requesting that Verizon produce documents regarding Core's interconnection with Verizon.[7] Verizon produced 23 documents.[8]

3. On April 23, 2003, the Commission released the *Liability Order*, finding that Verizon had violated section 251(c)(2)(D) of the Act by failing to interconnect with Core on just and reasonable terms. The *Liability Order* contains lengthy and detailed findings of fact in support of its holding, which are incorporated by reference herein. In brief, the *Liability Order* found that Verizon had unreasonably delayed in interconnecting with Core by allowing two cross-connect machines in Verizon's network, through which Core's traffic would have to travel, to exhaust and remain at exhaust for at least four months.[9] The *Liability Order* also found that Verizon had failed to notify Core in a reasonably timely manner of the likelihood and extent of the interconnection delay.[10]

4. On May 23, 2003, Verizon filed a Petition for Reconsideration of the *Liability*

[3] 47 U.S.C. § 251(c)(2).

[4] *See Liability Order*, 18 FCC Rcd at 7970, ¶ 20.

[5] 47 C.F.R. § 1.722(d).

[6] *See Liability Order*, 18 FCC Rcd at 7984 n.64. *See also* 47 C.F.R. § 1.722(c).

[7] Formal Complaint of Core Communications, Inc., File No. EB-01-MD-007 (filed Mar. 21, 2001) ("Complaint"), Ex. J (Interrogatory nos. 1-5); Reply of Core Communications, Inc. File No. EB-01-MD-007 (filed Apr. 16, 2001), Ex. C (Interrogatory nos. 6-7); Letter Ruling from Commission staff to counsel to Core and Verizon, File No. EB-01-MD-007 (dated June 5, 2001) (ordering Verizon to respond to Core interrogatory request nos. 1-7); Core's Motion to Compel, File No. EB-01-MD-007 (filed July 5, 2001) ("Motion to Compel"); Letter Ruling from Commission staff to counsel to Core and Verizon, File No. EB-01-MD-007 (dated Aug. 3, 2001) (granting Core's Motion to Compel in part and ordering Verizon to provide more complete responses to Core interrogatory request no. 6); Complainant's Motion for Additional Interrogatories, File No. EB-01-MD-007 (filed Aug. 17, 2001) (requesting that the Commission require Verizon to respond to Core interrogatory nos. 8-14); Letter Ruling from Commission staff to counsel to Core and Verizon (dated Oct. 10, 2001) (ordering Verizon to respond to Core interrogatory nos. 8-14 as modified) ("October Letter Ruling").

[8] Answer of Defendant Verizon Maryland, File No. EB-01-MD-007 (filed June 21, 2001), Exs. 1-13; Defendant's Supplemental Answer to Interrogatory Number 6 and Supplemental Response to Questions Posed by the Commission during the July 26, 2001 Status Conference, File No. EB-01-MD-007 (filed Aug. 10, 2001), Exs. 1-10.

[9] *Liability Order*, 18 FCC Rcd at 7979-82, ¶¶ 41-52.

[10] *Liability Order*, 18 FCC Rcd at 7976-79, ¶¶ 34-40.

Order.[11] The Petition did not ask the Commission to reconsider the *Liability Order* on the grounds of newly discovered evidence or evidence not otherwise in the record of the liability proceeding.[12]

5. On August 11, 2003, pursuant to section 1.722 of the Commission's rules, Core filed a Supplemental Complaint for Damages in this proceeding.[13] Relying solely on the Commission's findings in the *Liability Order*, Core requested compensatory damages, plus punitive damages for Verizon's alleged "malicious … wanton and reckless" conduct in interconnecting with Core.[14] Core did not submit any new evidence in support of its claim for punitive damages, and did not seek any additional discovery from Verizon.

6. In a telephone conference on September 5, 2003, counsel to Verizon informed Commission staff and Core's counsel that, in preparing its answer to the Supplemental Complaint, Verizon had discovered a number of documents which, Verizon admitted, should have been produced during the liability phase of the proceeding ("Documents"). On September 9, 2003, Commission staff conducted another telephone conference with the parties to discuss the status of the Documents. Verizon requested that the Documents be allowed into the record solely with respect to Core's claim for punitive damages. In response, Core stated that Commission staff should deny Verizon's request and exclude the Documents from the record. Commission staff ordered Verizon to produce the Documents to Core and to provide Core and the Commission a declaration based on personal knowledge explaining why Verizon did not discover and produce the Documents during the liability phase of the proceeding, and why Verizon has now discovered the Documents. Both parties were invited to submit briefing as to whether Commission staff should allow Verizon to enter the Documents into the record. Finally, Commission staff granted Verizon's request to append to its answer in the damages proceeding those Documents on which Verizon intended to rely in defending against Core's punitive damages claim, subject, however, to the Commission's ruling as to the admissibility of the Documents.[15]

7. On September 10, 2003, Verizon filed its answer to the Supplemental

[11] Verizon's Petition for Reconsideration of the Commission's Memorandum Opinion and Order, File No. EB-01-MD-007 (filed May 23, 2003) ("Petition").

[12] *Id.*

[13] First Amended Supplemental Complaint for Damages, File No. EB-01-MD-007 (filed Aug. 11, 2003) ("Supplemental Complaint"). *See* Supplemental Complaint for Damages, File No. EB-01-MD-007 (filed July 21, 2003).

[14] Supplemental Complaint at 13, ¶ 40. *See id.* at 14-15, ¶¶ 41-44.

[15] Letter Ruling from Commission staff to Counsel to Core and Verizon, File No. EB-01-MD-007 (dated Sept. 9, 2003). Commission staff also ruled that Core could elect, based on its review of the Documents, to wait for the Commission to rule as to the admissibility of the Documents before filing its Reply to Verizon's Answer to the Supplemental Complaint for Damages. *Id.* Core subsequently exercised this option. Letter from Michael B. Hazzard, counsel to Core, to Marlene Dortch, Secretary, FCC, File No. EB-01-MD-007 (filed Sept. 16, 2003). Accordingly, Commission staff temporarily stayed all further proceedings, pending release of the instant ruling. Letter Ruling from Commission staff to counsel to Core and Verizon, File No. EB-01-MD-007 (dated Sept. 23, 2003).

Complaint.[16] Verizon's Supplemental Answer identified nearly 150 relevant Documents that had not been produced earlier,[17] and attached nearly 100 of those Documents as exhibits.[18] The great majority of the Documents attached as exhibits to the Supplemental Answer concern a key issue in the liability phase of the proceeding: the exhaust of Verizon's cross-connect machines.[19] The rest of these Documents are correspondence between Verizon personnel, or between Verizon personnel and Core, regarding the interconnection delay with Core.[20]

8. On September 12, 2003, Verizon filed a brief in support of its request that Commission staff allow Verizon to enter the Documents into the record of the damages phase of this proceeding;[21] Verizon also filed a declaration purporting to explain why it had not discovered and produced the Documents in the liability phase of this proceeding.[22] In its papers, Verizon admits that it could have and should have produced the Documents in the liability phase of the proceeding.[23] Verizon then explains why such discovery and production did not occur. First, Verizon states that it failed to discover certain of the Documents because Verizon's counsel erred in the scope of their document search.[24] Second, Verizon failed to discover certain other Documents because its employees did not fully answer Verizon's counsel's questions regarding the existence of relevant evidence.[25] In other instances, Verizon states simply that it "doesn't know" why the Documents were not produced:

- "We have been unable to determine precisely why the documents in Mrs. Robinson's files (which now include Ms. Talbert's files) were not discovered during the liability phase of the case."[26]

[16] Verizon Maryland Inc.'s Answer to Core's Supplemental Complaint for Damages, File No. EB-01-MD-007 (filed Sept. 8, 2003) ("Supplemental Answer").

[17] Supplemental Answer, Tab G (Information Designation).

[18] Answer Exs. 1-98.

[19] Supplemental Answer, Exs. 7, 8, 14, 15, 18, 19, 20, 23, 24-28, 32-35, 37-39, 42, 45, 48, 50-98.

[20] Supplemental Answer, Exs. 1-6, 9-13, 16-17, 21, 22, 29-31, 36, 40-41, 43-44, 46-47, 49.

[21] Defendant's Response to FCC Letter Ruling, File No. EB-01-MD-007 (filed Sept. 12, 2003) ("Verizon Brief").

[22] Declaration of Ellen S. White, File No. EB-01-MD-007 (filed Sept. 12, 2003) ("White Dec'n").

[23] Verizon Brief at 3, 7.

[24] *See, e.g.*, White Dec'n at 5, ¶ 7 (Verizon counsel failed, during the liability phase of the proceeding, to ask whether a Customer Network Engineering database had been established for Core); *id.* at 6, ¶ 11 (Verizon's counsel did not interview Ms. Talbert, "the project manager who managed Core's interconnection," or her supervisor, Ms. Robinson, during the liability phase of the proceeding); *id.* at 8-9, ¶ 16 (counsel to Verizon failed to identify two Verizon employees who had responsive documents).

[25] *See, e.g.*, White Dec'n at 6, ¶ 10 (Messrs. DiMarino and Hunter "did not think" to identify a key database when questioned by Verizon's counsel); *id.* at 11, ¶ 22 (Ms. Sayer did not identify relevant documents to Verizon's counsel because she thought counsel had already obtained copies of the documents).

[26] White Dec'n at 8, ¶ 15 (emphasis added).

- "Verizon is unable to determine at this point whether these additional documents were inadvertently overlooked when Mr. Dreyer and Mr. DiMarino reviewed their files or whether the documents were in fact provided and were overlooked by counsel or not considered relevant at that time."[27]

On September 22, 3003, Core filed a brief arguing that Commission staff should reject Verizon's request to include the Documents in the record of the damages phase of this proceeding.[28]

III. DISCUSSION

A. The Commission May Exclude Documents That Should Have Been Produced During the Liability Phase of this Case.

9. We and the parties have identified several analogous precedents that provide useful guidance regarding the specific question presented here. First, we note that pursuant to the law of the case doctrine and Rules 37(b)(2), 37(c)(1), 56(d), and 60(b) of the Federal Rules of Civil Procedure,[29] federal courts often exclude or refuse to consider otherwise relevant evidence, where such evidence could and should have been produced earlier in the proceeding.[30]

[27] White Dec'n at 11-12, ¶ 24 (emphasis added).

[28] Core's Response to Verizon's Response to FCC Letter Ruling, File No. EB-01-MD-007 (filed Sept. 22, 2003).

[29] Federal Rule 37(b)(2) provides, in pertinent part: "If a party…fails to obey an order to provide…discovery,… the court…may make such orders in regard to the failure as are just, [including]…[a]n order…prohibiting [the disobedient] party from introducing designated matters in evidence." Fed. R. Civ. P. 37(b)(2). Federal Rule 37(c)(1) provides, in pertinent part: "A party that without substantial justification fails to disclose information required by Rule 26(a)…shall not, unless such failure is harmless, be permitted to use as evidence at a trial, at a hearing, or on motion any witness or information not so disclosed." Fed. R. Civ. P. 37(c)(1). Rule 56(d) authorizes the federal courts, in ruling on a motion for summary judgment, to "make an order specifying the facts that appear without substantial controversy…. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly." Fed. R. Civ. P. 56(d). Rule 60(b) authorizes the court to "relieve a party…from a final judgment, order, or proceeding for…newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial…" Fed. R. Civ. P. 60(b). Where appropriate, the Commission routinely takes guidance from the Federal Rules of Civil Procedure. *See, e.g., APCC Services, Inc. v. TS Interactive, Inc.*, 17 FCC Rcd 25523, 25526, ¶ 7 (Enf. Bur. 2002) (relying on the Federal Rules of Civil Procedure for guidance); *Premier Network Services, Inc. v. Southwestern Bell Tel. Co.*, 18 FCC Rcd 11474, 11475 at ¶ 4 (Enf. Bur., MDRD 2003) (same).

[30] *See* 18B Wright & Miller, *Federal Practice and Procedure Juris.2d* (1990) § 4478 (defining the law of the case doctrine as "the refusal to reconsider a matter once resolved in a continuing proceeding," and explaining that "[e]vidence that could have been presented earlier commonly is not considered [as a basis for departing from law of the case], in keeping with the general rules that discourage slovenly or ill-considered approaches to the first trial"); *Alliance for Cannabis Therapeutics v. DEA*, 15 F.3d 1131, 1134 (D.C. Cir. 1994) (describing the law of the case doctrine as "the practice of courts generally to refuse to reopen what has been decided") (quoting *Messenger v. Anderson*, 225 U.S. 436 444, 446 (1912)); *Baumer v. Baumer*, 685 F.2d 1318 (11th Cir. 1982) (upholding trial court's refusal to consider evidence regarding the value of an option where it was law of the case that the option's value was unascertainable); *Lyons v. Fisher*, 888 F.2d 1071, 1073-74 (5th Cir. 1989) (upholding trial court's refusal to consider evidence regarding consideration given for the transfer of land rights where it was law of the case that the transfer was a sham, and defendant had "both the reason and the opportunity" to introduce the evidence earlier); *Jankins v. TDC Management Corp.*, 21 F.3d 436 (D.C. Cir. 1994) (trial court correctly excluded evidence, pursuant to Federal Rule 37(b)(2), where the party seeking to introduce the evidence had (continued….)

These rules address a situation closely analogous to the case at hand. Moreover, the Commission has broad authority to take strong measures to redress problems in the discovery process.[31] And finally, the Commission's rules provide that in an analogous situation, we will not consider evidence produced only in the later stages of a proceeding -- section 1.106 of the Commission's rules provides that, unless the public interest requires otherwise, the Commission will deny any petition for reconsideration that relies on facts not previously presented, if those facts could have been presented earlier in the proceeding "through the exercise of reasonable diligence."[32] Though each of the foregoing authorities applies to different circumstances, they all generally rest on common purposes: to encourage the earliest possible disclosure of evidence; to promote fairness to the parties; to prevent inconsistencies as a matter proceeds; to foster diligence in the discovery process; to maintain respect for the tribunal and its requirements; and to conserve the resources of the parties and the tribunal. With these authorities and principles in mind, we now examine whether to allow Verizon to enter into the record of the damages phase of this proceeding the Documents that Verizon now admits it could and should have produced during the liability phase.

B. Allowing the Documents into the Record Now will Prejudice Core, Waste Commission Resources, and Undermine the Integrity of this Proceeding.

10. Applying the foregoing to the facts here, we deny Verizon's request to allow the Documents into the record. As previously stated, Verizon admits that it should have produced these Documents during the liability phase of this proceeding, either as required by Commission rule 1.724 or in response to Core's discovery requests.[33] Moreover, our review of the Documents appended to the Supplemental Complaint reveals that most, if not all, of these Documents also

(Continued from previous page)
violated the court's discovery orders); *Fusco v. General Motors Corp.*, 11 F.3d 259 (1st Cir. 1993) (same); *Hagans v. Henry Weber Aircraft Distributors, Inc.*, 852 F.2d 60 (3d Cir. 1988) (same); *Wilson v. Bradlees of New England, Inc.*, 250 F.3d 10 (1st Cir. 2001) (trial court correctly excluded evidence, pursuant to Federal Rule 37(c)(1), that should have been produced earlier pursuant to Federal Rule 26(a)); *Stallworth v. E-Z Service Convenience Stores,* 199 F.R.D. 366, 368 (M.D. Ala. 2001) (failure to produce evidence was not "harmless" within the meaning of Federal Rule 37(c)(1) even though plaintiff had the opportunity to respond to the new evidence on sur-reply; "plaintiff was prejudiced by having to spend additional time…at the eleventh hour, analyzing and responding to the material"); *Alberty-Velez v. Corp. De Puerto Ricao Para La Diffusion Publica*, 242 F.3d 418 (1st Cir. 2001) (trial court erred in allowing evidence at trial bearing upon a fact specified pursuant to Federal Rule 56(d)); *United Mine Workers of America 1974 v. Pittston Co.*, 984 F.2d 469 (D.C. Cir. 1993), *cert. denied*, 509 U.S. 924 (1994) (upholding trial court's refusal, on a Federal Rule 60(b) motion for reconsideration of an order granting summary judgment on liability to plaintiff, to consider evidence which could have been produced prior to the summary judgment motion); *Stoller v. Marsh*, 682 F.2d 971, 981 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1037 (1983) (evidence submitted in support of a Federal Rule 60(b) motion for reconsideration of the grant of a motion for summary judgment will only be considered if the evidence was unavailable before summary judgment was granted).

[31] *See Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers*, Report and Order, 12 FCC Rcd 22497, 22610, ¶ 278 (1997), Order on Reconsideration, 16 FCC Rcd 5681 (2001).

[32] 47 C.F.R. § 1.106.

[33] Verizon Brief at 1, 2.

should have been produced in response to Commission staff orders.[34] Further, Verizon's failure to produce the Documents stemmed from its own negligence. As Verizon concedes, the Documents were in Verizon's possession, custody, and control throughout the liability phase of the proceeding; and Verizon's own declaration reveals that, through the exercise of reasonable diligence, it clearly could have gathered and produced the Documents during the liability phase of this proceeding.[35] Verizon's error is not a minor one. Discovery during the liability phase of the proceeding consumed more than six months; yet Verizon managed to overlook far more documents than it actually produced.

11. Considerations of fairness also counsel against admitting the Documents, because doing so would severely prejudice Core. Core justifiably relied upon the facts as found in the *Liability Order* in framing its Supplemental Complaint. Yet Verizon's Supplemental Answer relies upon almost 100 Documents not in the record of the *Liability Order*. To the extent that these Documents contradict or undermine the facts found in the *Liability Order*, Core's Supplemental Complaint is affected, and Core is unfairly surprised. Core would have to review the Documents, perhaps take additional discovery, and perhaps even seek to amend its Supplemental Complaint – all potentially costly and time-consuming processes. As a result of Verizon's negligent misconduct, Core should not have to suffer the delay and expense of belatedly re-visiting the facts surrounding its interconnection with Verizon.

12. Finally, we decline to allow the Documents into the record in order to preserve Commission resources and to protect the integrity of this proceeding. The Documents pertain directly to the very issues examined and discussed at length in the *Liability Order* – namely, the cross-connect machine capacity exhaust and Verizon's communications with Core regarding the interconnection delay. Accordingly, allowing the Documents into the record would waste Commission resources by requiring Commission staff to re-visit the very issues resolved with the release of the *Liability Order*. Moreover, allowing the Documents into the record could result in factual findings in the damages phase of this proceeding that conflict with the *Liability Order*'s factual findings. Although Verizon suggests that the documents may be admitted solely for purposes of determining whether Verizon acted willfully or maliciously and not for purposes of altering the *Liability Order's* conclusions concerning the reasonableness of Verizon's conduct, we do not believe it is possible to parse the evidence so finely.[36]

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[34] For example, three-quarters of the exhibits appended to Verizon's Supplemental Complaint are routine reports from Verizon's equipment vendors regarding the status of Verizon's orders for the cross-connect machines' equipment upgrade, s*ee* Supplemental Answer Exs. 50-98, or are internal Verizon documents discussing the status of the equipment orders. *See* Supplemental Answer Exs. 7, 8, 14, 15, 18, 19, 20, 23, 24-27, 28, 32-35, 37-39, 42, 45, 48. These Documents should have been produced, *inter alia*, in response to the Commission staff's order that Verizon produce all documents "demonstrating that Verizon's equipment vendors were unable to satisfy Verizon's request for any type of equipment that delayed Verizon's provision of interconnection to Core….," and all documents "related to the change of completion date [for completion of the cross-connect machines' equipment upgrade]." October 10 Letter Ruling at 4-5.

[35] *See* paragraph 8, *supra*.

[36] Further, we are concerned that Verizon's request that we allow evidence into the record that is potentially inconsistent with the factual findings and conclusions of the *Liability Order* is at odds with Verizon's admission that it does not seek to reopen the *Liability Order*'s ruling and its underlying factual predicates.

13. Verizon argues that the Documents should be allowed into the record because its failure to produce them during the liability phase of the proceeding was inadvertent. According to Verizon, "[m]any [federal] courts require a showing of 'flagrant bad faith' or 'callous disregard' of the Federal Rules before imposing a sanction as severe as excluding evidence."[37] We do not agree. The cases cited by Verizon involve the imposition of sanctions for discovery abuse.[38] Yet penalizing Verizon is not the determinative reason for our exclusion of the Documents. Rather, as discussed, our decision rests primarily upon considerations of fairness to the parties, preservation of Commission resources, and the protection of the integrity of this proceeding by avoiding inconsistent findings in the same proceeding. In any event, we agree with those authorities that do not require a finding of egregious misconduct where, as here, the failure to produce is negligent, material, and prejudicial to the opposing party and to the process.[39]

14. In sum, excluding the Documents from the record will serve the same purposes that the Commission and courts seek to promote in analogous contexts: promoting fairness to Core; preventing inconsistent findings of fact and conclusions of law; conserving the resources of the Commission and Core; and fostering diligence in the discovery process and respect for the Commission's complaint processes as a whole. Accordingly, we deny Verizon's request to admit the Documents into the record.

IV. ORDERING CLAUSE

15. ACCORDINGLY, IT IS ORDERED, pursuant to sections 4(i), 4(j), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 208, sections 1.720-1.736 of the Commission's rules, 47 C.F.R. §§ 1.720-1.736, and the authority delegated in section 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111 and 0.311, that the Documents may not be entered into the record of this proceeding, and that Verizon's Answer is stricken. Commission staff will promptly issue a schedule for further actions to be taken in this proceeding.

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[37] Response at 7.

[38] *See* Response at 7-8 and the cases cited therein.

[39] *See*, *e.g.*, *Sheperd v. ABC*, 62 F.3d 1469, 1478 (D.C. Cir. 1995) (stating that the sanction of excluding evidence is remedial, not punitive); *Jankins v. TDC Management Corp.*, 21 F.3d 436 (D.C. Cir. 1994) (trial court correctly excluded evidence pursuant to Federal Rule 37(b)(2) even though the sanctioned party had not acted in bad faith); *Fusco v. General Motors Corp.*, 11 F.3d 259 (1st Cir. 1993); *Hagans v. Henry Weber Aircraft Distributors, Inc.*, 852 F.2d 60 (3d Cir. 1988) (same). *See also Wilson v. Bradlees of New England, Inc.*, 250 F.3d 10, 18-21 (1st Cir. 2001) (upholding trial court's excluding evidence pursuant to Federal Rule 37(c)(1) even though the sanctioned party had not acted in bad faith); *Southern States Rack and Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592, 597-598 (4th Cir. 2003); *Finley v. Marathon Oil Co.*, 75 F.3d 1225, 1230-31 (7th Cir. 1996); *Yeti by Molly Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001); *BankAtlantic v. Blythe Eastman Paine Webber, Inc.* 12 F.3d 1045, 1049 (11th Cir.1994); *Stallworth v. E-Z Service Convenience Stores*, 199 F.R.D. 366, 368-69 (M.D. Ala. 2001); *Carney v. Kmart Corp.*, 176 F.R.D. 227, 229 (S.D. W.Va. 1997) (same).

FEDERAL COMMUNICATIONS COMMISSION

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Chief, Enforcement Bureau